LIBRARY
SUPREME COURT U S

Office - Supreme Court, U.S.
FILED
AUG 12 1957
JOHN T. ...

IN THE

Supreme Court of the United States

October Term, 1957

No. 2074

IN THE MATTER OF RENAIRE CORPORATION (PENNSYLVANIA) et al.,

Petitioners

vs.

FEDERAL TRADE COMMISSION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EDWIN P. ROME
Attorney for Petitioners.

Blank, Rudenko & Klaus,
1660 Suburban Station Bldg.,
Philadelphia 3, Pa.
Of Counsel

Murrelle Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa.

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI:	
Opinions Below	2
Jurisdiction	2
Question Presented	3
Statutes and Rules Involved	4
Statement	6
Reasons for Granting Writ	9
Conclusion	19
Appendix A—Orders of Court of Appeals	20
Appendix B—Order of Federal Trade Commission	22
Appendix C—Statutory Provisions Involved	26

TABLE OF CITATIONS

CASES:	
Baltimore & Ohio R.R. Co. v. Brady, 288 U. S. 448 (1933)	10
Bernstein v. Herren, 136 F. Supp. 493 (S. D. N. Y., 1956)	11, 12
Chamber of Commerce v. Federal Trade Commission, 280 Fed. 45 (8 Cir., 1922)	8, 18
Coffman v. Breeze Corporation, 323 U.S. 316 (1945)	8
Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407 (1942)	13
Crown Zellerbach Corp. v. Federal Trade Commission, 156 F. 2d 927 (9 Cir., 1946)	8, 17
El Dorado Oil Works v. United States, 328 U.S. 12, 18-19 (1946)	14
Federal Power Com. v. Metropolitan Edison Co., 304 U.S. 375 (1938)	15
Federal Power Com. v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1949)	10, 12

Federal Trade Com. v. Bunte Bros., 312 U.S. 349, 350 (1941) 11
Fitzpatrick v. Snyder, 220 F. 2d 552 (1 Cir. 1955) 11
Frozen Foods Express v. United States, 351 U.S. 40 (1956) 13
Gonzales v. Williams, 192 U.S. 1 (1904) 10
Great Northern Railroad Co. v. Merchants Elevator Co., 259 U.S. 285 (1922) 10, 13
Interstate Commerce Commission v. United States ex rel. Humbolt S.S. Co., 224 U.S. 474 (1912) 13
KVOS, Inc. v. Associated Press, 299 U.S. 269 (1936) 8
Levers v. Anderson, 326 U.S. 219 (1945) 9
Lichten v. Eastern Airlines, Inc., 189 F. 2d 939, 945-47 (2 Cir., 1951) 10
Louisville & N. R. Co. v. F. W. Cook Brewing Co., 223 U.S. 70 (1912) 10
Ng Fung Ho v. White, 259 U.S. 276 (1922) 13
Ogden City v. Armstrong, 168 U.S. 224 (1897) 10
Parker v. Lester, 112 F. Supp. 433 (N. D. Cal., 1953) 11
Penna. R.R. Co. v. International Coal Mining Co., 230 U.S. 184 (1913) 10, 13
Penna. R.R. Co. v. Puritan Coal Mining Co., 237 U.S. 121 (1915) 10
Penna. R.R. Co. v. Sonman Shaft Coal Co., 242 U.S. 120 (1916) 10
Petroleum Exploration, Inc. v. Public Service Commission of Kentucky, 304 U.S. 200 (1938) 15
Public Utilities Commission v. United Fuel Gas Co., 317 U.S. 456 (1943) 10, 12
Reynolds v. United States, 292 U.S. 443 (1934) 10
Rochester Telephone Corp. v. United States, 307 U.S. 125 (1939) 13, 14, 18
Samson Crane Co. v. Union Nat. Sales, 87 F. Supp. 218, 221 (D. Mass., 1949) 14
Securities & Exchange Commission v. Cogan, 201 F. 2d 78 (9 Cir., 1951) 13
Skinner & Eddy Corp. v. United States, 249 U.S. 557 (1919) 10, 11

Stanard v. Olesen, 74 S. Ct. 768 (May 22, 1954) 16
State of New York v. United States, 257 U.S. 591 (1922) 10
Turner, Dennis & Lowry Lb. Co. v. Chicago M. & St. P. Ry. Co., 271 U.S. 259 (1926) 10
United States v. Atchinson, T. & S. F. R. Co., 234 U.S. 476 (1914) 15
United States ex rel. Bradley v. Watkins, 163 F. 2d 328 (2 Cir., 1947) 10
United States v. Fritz Properties, Inc., 89 F. Supp. 772 (N. D. Cal., 1950) 13
United States v. Harvey, 131 F. Supp. 493 (N. D. Tex., 1954) 9
United States v. Illinois Central R. Co., 244 U.S. 82 (1917) 15
United States v. Palmer, 223 F. 2d 893 (3 Cir., 1955) 11
United States v. Yellow Cab Co., 332 U.S. 218 (1947) 8
Varney v. Warehime, 147 F. 2d 238 (6 Cir., 1945) 10, 12
Waite v. Macy, 246 U.S. 606 (1918) 10

STATUTES:

Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. §1009, Sec. 10 4, 16, 33
Federal Trade Commission Act, 38 Stat. 719, 15 U.S.C. §45, Sec. 5 4, 8, 14, 15, 26

RULE:

Rules of Practice for Federal Trade Commission, 16 C.F.R. (Cum. Pkt. Supp.) 3.20, Rule 20 4, 5, 16, 25

Case Caption

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1957
No.

In the Matter of
Renaire Corporation (Pennsylvania),
Renaire Corporation (Washington, D. C.),
Renaire of South Delaware, Inc.,
Renaire Corp. of Wilmington,
Renaire of Maryland, Inc.,
Renaire of New Jersey, Inc.,
Renaire Corp. of Delmont,
Renaire of Allentown, Inc.,
Renaire of Philadelphia, Inc.,
Renaire Corp. of Lancaster,
Renaire of South Jersey, Inc.,
Leonard S. Cohen,
Joseph Sherwood,
Samuel Saler,
Morton Saler,
Harold B. Saler,
William Speckman,
Bertram P. Schrank, and
Jules Hecht, individually and as officers of said
corporations,

Petitioners

v.

Federal Trade Commission, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners above-named pray that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Third Circuit entered in the above cause on May 8, 9, 1957, dismissing for want of jurisdiction the petition to review an order of the Federal Trade Commission.

OPINIONS BELOW

The Orders of the Court of Appeals for the Third Circuit are not reported. The order of the Federal Trade Commission is not reported.

JURISDICTION

The orders of the Court of Appeals sought to be reviewed are dated May 8, 9, 1957, and copies thereof are contained in Appendix "A" hereto. On March 29, 1957, the Commission sent a telephonic notice of denial of appeal followed on April 1, 1957 by a telegraphic confirmation and on May 15, 1957 the Commission issued its formal order, a copy of which is set forth in Appendix "B" hereto.

QUESTION PRESENTED

In a proceeding under Section 5 of the Federal Trade Commission Act respondents, after counsel supporting the complaint rested, moved to dismiss upon the ground that nine of the corporate respondents were engaged solely in intrastate commerce. The Hearing Examiner denied the motion. Appeal was taken to the Commission and denied Respondents petitioned the Court of Appeals for review. The Commission moved to dismiss the petition upon the single ground that the petition was untimely being addressed to an interlocutory order of the Commission; it was thereby admitted that the Commission lacked jurisdiction over the said nine corporate respondents.

The question presented is whether the Court of Appeals correctly held itself powerless to entertain the petition for review of the Commission's order denying the said appeal.

STATUTES AND RULES INVOLVED

The pertinent portions of Section 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U.S.C. §45; of Section 10 of The Administrative Procedure Act,[1] 60 Stat. 243, 5 U.S.C. §1009; and Rule 20 of the Rules of Practice for the Federal Trade Commission, 16 CFR (Cum. Pkt. Supp.) 3.20, are as follows:

Section 5, Federal Trade Commission Act

(d) The jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Section 10, Administrative Procedure Act

(e) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection

[1] The complete text of these sections is contained in Appendix "C" hereto.

whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Rule 20, Rules of Practice for the Federal Trade Commission

3.20 *Interlocutory Appeals.* (a) Except as provided in Rules 17 (d), 25 (c) and 29 (c), interlocutory appeals from rulings of a hearing examiner during the time a proceeding is pending before him shall not be entertained by the Commission except as provided in paragraph (b) of this rule.

(b) (1) Interlocutory appeals shall be in the form of a brief which shall set out the grounds of the appeal and the necessity for immediate decision. The brief must be filed within ten days after notice of the adverse ruling complained of. Answer thereto may be filed within ten days after service of such appeal.

(2) The Commission, or such one or more of its members as it shall designate, shall consider the appeal forthwith, and may grant the appeal on finding that such ruling involves substantial rights and will materially affect the final decision and that a determination of its correctness before the conclusion of the trial would better serve the interests of justice. Such

an appeal shall not operate to suspend the hearings unless otherwise ordered by the hearing examiner or by the Commission.

(c) No error in a ruling of a hearing examiner is waived by failure to take an interlocutory appeal. On appeal from the initial decision, any such ruling may be assigned as error where such ruling is shown to have substantially affected the rights of the complaining party.

STATEMENT

This case grows out of an investigation by the Federal Trade Commission commenced in 1953. On May 17, 1956, the Commission issued a complaint against petitioners. Since 1953 petitioners have been carrying on their business in the usual course without incident. The field of business in which petitioners are engaged is that of purveying food to the public as an adjunct to which they offer for sale a freezer. The gist of the Commission's complaint is that the petitioners have misled the public in advertising that food and freezer may be obtained at a cost no greater than that which the particular customer has previously incurred for food alone. The Commission has specifically disavowed any contention that the quality of the food or freezer is other than superior. Petitioners have defended against the charge levelled against them on the ground that their advertising is scrupulously and literally true.

In October, 1956, after numerous hearings, counsel supporting the complaint rested, at which time petitioners

moved to dismiss upon the ground, inter alia, that nine of the eleven corporate petitioners were engaged in intrastate commerce and, therefore, were not subject to the jurisdiction of the Federal Trade Commission. On December 11, 1956, the Hearing Examiner permitted counsel supporting the complaint to reopen the record for purposes of presenting additional evidence in an attempt to establish the existence of interstate commerce. On February 11, 1957, counsel supporting the complaint once more rested his case and petitioners renewed their motion to dismiss. On March 21, 1957, the Hearing Examiner issued an order denying the motion to dismiss. On March 28, 1957, an appeal from the order of March 21, 1957 was filed with the Federal Trade Commission.

On March 29, 1957, the Commission dismissed the appeal. On April 1, 1957, petitioners filed in the Court of Appeals a petition for review of the order of March 29, 1957. Thereafter, the Commission filed its motion to dismiss the petition for review because, it was alleged, the petition showed on its face that the order of which review was sought was interlocutory in that the Commission had not issued an order to cease and desist, and therefore the petition was premature. The Commission, thus, demurred, and for present purposes it must be taken as true [2] that the

[2] The petition for review filed in the court below alleges in pertinent part: "The Commission has decided the jurisdictional question contrary to the undisputed facts and erroneously as a matter of law in that nine of the eleven named corporate respondents carry on their activities exclusively within the geographical borders of specific states, as a result of which they are engaged in intrastate commerce exclusively and not in interstate commerce." Absence of jurisdiction in the Commission over the nine corporate petitioners was necessarily admitted by a motion to dismiss bot-

Commission was without jurisdiction of nine of the eleven corporate petitioners.

On May 9th, the Court of Appeals dismissed the petition for review for want of jurisdiction. In a companion order of May 8, 1957, discharging an earlier order staying all proceedings, the Court of Appeals stated that the petition being addressed to an interlocutory order of the Commission was not reviewable under Section 5(c) of the Federal Trade Commission Act, 15 U.S.C., 45(c), and cited as authority *Chamber of Commerce v. Federal Trade Commission*, 280 Fed. 45 (8 Cir., 1922), and *Crown Zellerbach Corp. v. Federal Trade Commission*, 156 F. 2d 927 (9 Cir., 1946).

---

toned upon the sole ground that the Commission's order was interlocutory. *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *Coffman v. Breeze Corporations*, 323 U.S. 316 (1945); *KVOS, Inc. v. Associated Press*, 299 U.S. 269 (1936).

REASONS FOR GRANTING THE WRIT

The decision below marks a refusal of the Court of Appeals, despite the admitted absence of jurisdiction in the administrative agency, to review an order of the Federal Trade Commission on the ground that the Commission's order was interlocutory. In so holding, the Third Circuit fails to give effect to the principle that judicial intervention is proper where it is clear that the administrative agency is acting outside the bounds of its statutory jurisdiction. The decision fails also to recognize that, under the Federal Trade Commission Act and the Administrative Procedure Act, the Court of Appeals has jurisdiction to review such an order of the Commission. There was thus decided an important question of Federal law which has not been but should be settled by this Court.

1. In holding that the order of March 29, 1957 was unappealable, the decision below fails to follow the applicable decisions of this Court, is in conflict with decisions of the Courts of Appeals, and with the Federal Trade Commission and Administrative Procedure Acts.

The doctrine of exhaustion of administrative remedies is not based upon the Constitution or statute, but came into being as part of judicial policy. *United States v. Harvey*, 131 F. Supp. 493 (N.D. Tex., 1954). The doctrine is not an inflexible rule of law, but a rule governing the exercise of discretion. *Levers v. Anderson*, 326 U.S. 219 (1945).

Where it is claimed that the administrative agency has exceeded its statutory powers and is without jurisdiction,

there is no requirement that the administrative remedy be exhausted. Jurisdictional questions constitute an exception to the doctrine of exhaustion of administrative remedies. One who claims that administrative action is void because in excess of the administrative body's statutory authority may proceed directly to court without awaiting an administrative determination as to the validity of that administrative action. If it be claimed that the administrative body is acting without jurisdiction, as here, there is no room for an administrator's expertise. Uniformity will be attained, if Courts of Appeals disagree, through decision by this Court,[3] *Skinner & Eddy Corp. v. United States*, 249 U.S. 557 (1919); *Ogden City v. Armstrong*, 168 U.S. 224 (1897); *Gonzales v. Williams*, 192 U.S. 1 (1904); *Louisville & N.R. Co. v. F. W. Cook Brewing Co.*, 223 U.S. 70 (1912); *Pennsylvania R.R. Co. v. International Coal Mining Co.*, 230 U.S. 184 (1913); *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915); *Pennsylvania R.R. Co. v. Sonman Shaft Coal Co.*, 242 U.S. 120 (1916); *Waite v. Macy*, 246 U.S. 606 (1918); *Great Northern Railroad Company v. Merchants Elevator Company*, 259 U.S. 285 (1922); *State of New York v. United States*, 257 U.S. 591 (1922); *Turner, Dennis & Lowry Lb. Co. v. Chicago M & St. P Ry. Co.*, 271 U.S. 259 (1926); *Baltimore & Ohio R.R. Co. v. Brady*, 288 U.S. 448 (1933); *Reynolds v. United States*, 292 U.S. 443 (1934); *Public Utilities Commission v. United Fuel Gas Co.*, 317 U.S. 456 (1943); *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949); *Varney v. Warehime*, 147 F. 2d 238 (6 Cir., 1945); *United States ex rel. Bradley v. Wat-*

---

[3] See Frank, J. (dissenting) in *Lichten v. Eastern Airlines, Inc.*, 189 F. 2d 939, 945-47 (2 Cir., 1951).

kins, 163 F. 2d 328 (2 Cir., 1947); *United States v. Palmer*, 223 F. 2d 893 (3 Cir., 1955) (dissent); *Fitzpatrick v. Snyder*, 220 F. 2d 552 (1 Cir., 1955); see also *Bernstein v. Herren*, 136 F. Supp. 493 (S.D. N.Y., 1956); *Parker v. Lester*, 112 F. Supp. 433 (N.D. Cal., 1953).

In *Skinner & Eddy Corp. v. United States*, *supra*, the Court per Mr. Justice Brandeis said (pp. 562-63):

> * * * If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the commission [citing cases] * * * But plaintiff does not contend that 75 cents is an unreasonably high rate, or that it is discriminatory, or that there was mere error in the action of the commission. *The contention is that the commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the commission.* Interstate Commerce Commission v. Diffenbaugh, 222 U.S. 42, 49, 32 Sup. Ct. 22, 56 L. Ed. 83; Louisiana & P. Ry Co. v. United States (Com. C.) 209 Fed. 244, 251; Atlantic Coast Line R. Co. v. Interstate Commerce Commission (Com. C.) 194 Fed. 449, 451. Sacramento Case, supra [United States v. Merchants' & Manufacturers' Traffic Association, 242 U.S. 178] was a case of this character. Compare Interstate Commerce Commission v. Louisville & Nashville Railroad Co., 227 U.S. 88, 92, 33 Sup. Ct. 185, 57 L. Ed. 431; Southern Pacific Co. v. Interstate Commerce Commis-

sion, 219 U.S. 433, 31 Sup. Ct. 288, 55 L. Ed. 283. The District Court properly assumed jurisdiction of this suit. (emphasis supplied)

In *Carney v. Warchina*, *supra*, p. 243-44, the court held:

> Failure to exhaust administrative remedies generally precludes resort to the courts. * * * *However, this is not an ironclad rule and it has no application where the defect urged goes to the jurisdiction of the administrative agency.* Skinner & Eddy Corp. v. United States, 249 U.S. 557, 562, 39 S. Ct. 375, 63 L. Ed. 772. (emphasis supplied)

See also *Bernstein v. Herren*, *supra*, p. 496, where the court said:

> * * * *But a well-recognized exception to the requirement of the exhaustion of administrative remedies exists where the action of the administrative body is jurisdictionally defective in violation of plaintiff's legal rights under statute.* Skinner & Eddy Corp. v. United States, 249 U.S. 557, 39 S. Ct. 375, 63 L. Ed. 772; Fitzpatrick v. Snyder, 1 Cir., 220 F. 2d 522; Dragna v. Landon, 9 Cir., 209 F. 2d 26; United States ex rel. De Lucia v. O'Donovan, 7 Cir., 178 F. 2d 876; Wettre v. Hague, 1 Cir., 168 F. 2d 825. * * * (emphasis supplied)

In *Federal Power Comm. v. Panhandle Eastern Pipe Line Co.*, *supra*, and *Public Utility Comm. v. United Fuel & Gas Co.*, *supra*, initial court determinations of agency jurisdiction were permitted where the agency's contention was plainly invalid on its face and, therefore, constituted

an error of law. In *Pennsylvania R.R. Co. v. International Coal Mining Co.*, *supra*, p. 197, the Court, holding that recourse to the Commission was not a necessary preliminary to suit, said of a classification in a tariff: "It could not have been legalized by any proof, nor could the commission by any order have made it valid". So here, if petitioners are in intrastate commerce no action against them by Federal Trade Commission could be legalized by any proof relating to the nature of their advertising, nor could the Commission by any order make such action valid.

Intermediate agency action which satisfies the test of primary jurisdiction in the administrative agency is appealable. *Rochester Telephone Corp. v. United States*, 307 U.S. 125 (1939); *Columbia Broadcasting System, Inc., v. United States*, 316 U.S. 407 (1942); *Frozen Foods Express v. United States*, 351 U.S. 40 (1956).

There is no requirement that agency action to be appealable be final agency action or be in the form of an order which the court can enforce. *Rochester Telephone Corp. v. United States*, *supra*, p. 136.

The question of jurisdiction is one of law for the Court. *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922); *Interstate Commerce Commission v. United States ex rel. Humboldt S. S. Co.*, 224 U.S. 474 (1912); *Ng Fung Ho v. White*, 259 U.S. 276 (1922); *United States v. Fritz Properties, Inc.*, 89 F. Supp. 772 (N.D. Cal., 1950). Under the Administrative Procedure Act questions of law are not for the agency but for the court, *Securities & Exchange Commission v. Cogan*, 201 F. 2d 78 (9 Cir., 1951).

Under the "primary jurisdiction" doctrine matters which call for technical knowledge must be first passed upon by the administrative agency before court action can be invoked. But here the question is one of jurisdiction, hence is a question of law for the court, not one of fact for the administrative agency. Even were it otherwise, the agency had already passed upon the matter, and so the primary jurisdiction doctrine has been satisfied.

The Court below had to assume that the Commission had no jurisdiction over nine of the eleven corporate petitioners. Even without that admission, the evidence before the Commission adduced by counsel supporting the complaint, demonstrated, as a matter of law, that the petitioner respondents were not engaged in interstate commerce, that everything each of those nine corporate petitioners did was limited entirely within the geographical borders of a state.

Petitioners are charged with unfair methods of competition under Section 5 of the Federal Trade Commission Act. The concern of Section 5 is "unfair methods of competition in commerce". The "commerce" in which these methods are barred is *inter*state commerce only. *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349, 350 (1941); see also *Samson Crane Co. v. Union Nat. Sales*, 87 F. Supp. 218, 221 (D. Mass., 1949).

The order of the Commission in question is not abstract, theoretical or academic. Cf. *El Dorado Oil Works v. United States*, 328 U.S. 12, 18-19 (1946). The order appealed from denies, in effect, an exemption from the terms of the statute and is, therefore reviewable. *Rochester Tele-*

phone Corp. v. United States, supra, p. 132; *United States v. Atchinson, T. & S. F. R. Co.*, 234 U.S. 476 (1914).

The question now before this Court was not before it in *Petroleum Exploration, Inc. v. Public Service Commission of Kentucky*, 304 U.S. 209 (1938). There it was noted (p. 222, note 20) that whether the expense of proceeding after the allegedly erroneous determination of jurisdiction by the Commission could be avoided by a challenge of its interlocutory orders on the plea to the jurisdiction was not within this Court's "province to decide".

This is not a case where there is merely an order of the agency setting a case for hearing, despite a challenge to its jurisdiction, *United States v. Illinois Central R. Co.*, 244 U.S. 82 (1917) or where there is no order of the Commission before the Court of Appeals for review, *Federal Power Commission v. Metropolitan Edison Co.*, 304 U.S. 375 (1938), or where upon application for injunction a Commission's order sur jurisdiction is not final, but is pending on application for rehearing, *Petroleum Exploration v. Public Service Comm., supra.*

The Court of Appeals had jurisdiction to review the order appealed from. Section 5(d) of the Federal Trade Commission Act provides that the jurisdiction of the Court of Appeals to affirm, enforce, modify or set aside *orders* of the Commission shall be exclusive. The statute in no way limits the kind of order which may be appealed to the Court of Appeals.

The Administrative Procedure Act provides (with exceptions not here pertinent) that any person suffering legal wrong because of *any* agency action shall be entitled to

judicial review thereof. Section 10(a). That Act, Section 10 (c), does not limit the class of orders which may be appealed and authorizes review of *intermediate* agency action, as follows:

> Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. *Any preliminary, procedural or intermediate action or ruling not directly reviewable* shall be subject to review upon the review of the final agency * * * (emphasis supplied).

The quoted section thus provides for judicial review of intermediate agency action upon the review of final agency action, and recognizes that there is a class of intermediate agency actions and rulings which is subject to review before the completion of the administrative process.[4] The quoted section postulates the existence of a class of "preliminary, procedural, or intermediate agency action or ruling" which is directly reviewable by the court prior to the "review of the final agency action."

Petitioners here proceeded in accord with Rule 20 of the Rules of Practice of the Federal Trade Commission providing for interlocutory appeals. Interlocutory appeals are granted by the Commission thereunder "on finding that such ruling [of the hearing examiner] involves substantial rights and will materially effect the final decision and that a determination of its correctness before the conclusion of the trial will better serve the interests of justice." No more proper basis for such an appeal could be

[4] Cf. *Stanard v. Olesen*, 74 S. Ct. 768 (May 22, 1954).

furnished than in the instant proceeding where the agency is plainly acting without its jurisdiction. It is a basic canon of our law that jurisdiction is a question which can always be raised and should be decided preliminarily.

In short, the administrative agency here has exercised its primary jurisdiction over the question of interstate commerce and its own jurisdiction. Petitioners availed themselves of the agency's administrative procedure in taking an appeal to the Commission. The Federal Trade Commission Act and the Administrative Procedure Act authorize appeals from an administrative agency to the Courts of Appeals in a particular class of interlocutory orders. An order of the Commission, patently erroneous, on the question of jurisdiction is such an order as need not abide final agency action in order to be reviewed.

The cases cited by the Court of Appeals below do not support its decision to the contrary. *Crown Zellerbach v. Federal Trade Commission*, relied upon by the Third Circuit below, is not properly applicable. That case involved the propriety of restraining the Commission from asserting jurisdiction at a time when the case had not been heard by the Commission. As the Court said therein: "* * * We were asked to restrain respondent from taking certain steps * * * ". In the instant case no restraint is sought against a hearing preventing the agency from exercising its primary jurisdiction. On the contrary, review of a plainly erroneous order on jurisdiction is sought after an interlocutory appeal as provided for by the Commission's own procedure. Certainly, as far as the agency is concerned, petitioners have exhausted their administrative remedy. Certainly also, insofar as the Court of Appeals

is concerned, the decisions of this Court make it clear that questions of jurisdiction are an exception to the doctrine that judicial review can be had *only* after final agency action. In the court below the Commission contended that the doctrine of exhaustion of remedies was controlling. The present case clearly falls within the exceptions established to that doctrine.

Chamber of Commerce v. Federal Trade Commission was also relied on by the Third Circuit below. Insofar as that case is to be read for the principle that a Court of Appeals has no jurisdiction to review a palpably erroneous ruling on jurisdiction by the Federal Trade Commission after an interlocutory appeal to the Commission from the hearing examiner in conformity with the Rules of Practice of the Commission, we submit that it is contrary to the mandates of the Federal Trade Commission Act and the Administrative Procedure Act discussed above. Any possible vitality which this case might have had was eradicated by the decision in *Rochester Telephone Corp. v. United States, supra*, and *Chamber of Commerce* has not been cited in the decisions of this Court since 1939.

2. The decision below, unless reversed, will constitute a precedent of general importance, foreclosing preliminary judicial review of the question whether the Commission is acting *ultra vires*, even when a respondent contesting the Commission's actions has exhausted the administrative procedure for that contest. But the principle has been too well established by this Court to be now gainsaid that an administrative agency acting *ultra vires* is enjoinable by the court. Certainly, no reason exists for prohibiting preliminary judicial review of an order contesting the agen-

cy's authority when that question has been raised in an orderly fashion and when the agency is admittedly acting without the bounds of its authority.

The gravity of the decision below lies in its categorical foreclosure of judicial review of such orders of the Federal Trade Commission (and, to be sure, by analogy, of orders of other administrative agencies).

To deny judicial review under the circumstances here presented is to totally subvert an exception to the doctrine of exhaustion of administrative remedies long recognized by this Court.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,
EDWIN P. ROME,
Attorney for Petitioners.

BLANK, RUDENKO & KLAUS,
1660 Suburban Station Bldg.,
Philadelphia 3, Pa.,
Of Counsel.

Dated: July , 1957

APPENDIX A

ORDERS OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 12,218

Renaire Corporation (Pennsylvania) et al.,
Petitioners

v.

Federal Trade Commission,
Respondent

Present: McLaughlin, Kalodner and Hastie, Circuit Judges

ORDER

The petition for review in this case is addressed to an interlocutory order of the Commission. It is clearly not reviewable. 15 U.S.C. Sections 45(c) and 5(c). Chamber of Commerce v. Federal Trade Commission, 280 Fed. 45 (8 Cir. 1922); Crown Zellerbach Corp. v. Federal Trade Commission, 156 F. 2d 927 (9 Cir. 1946).

Order of Court of Appeals Dated May 9, 1957

Our order of April 4, 1957 staying all further proceedings before Respondent in its Docket No. 6555 is discharged and for nothing holden.

By the Court,
McLaughlin,
Circuit Judge.

Dated: May 8, 1957.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,218

Renaire Corporation (Pennsylvania) et al.
Petitioners

vs.

Federal Trade Commission
Respondent

Present: McLaughlin, Kalodner and Hastie, *Circuit Judges*

It is ORDERED that the Petition for Review, in the above entitled case be, and hereby is dismissed for want of jurisdiction.

By the Court,
McLaughlin,
Circuit Judge

May 9, 1957

APPENDIX B

ORDER OF THE FEDERAL TRADE COMMISSION

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners:

John W. Gwynne, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

Docket No. 6555

In the Matter of

Renaire Corporation (Pennsylvania), a corporation, et al.

ORDER RULING ON INTERLOCUTORY APPEAL

The respondents having filed an interlocutory appeal from the hearing examiner's order of March 21, 1957, denying the respondents' motion to dismiss the complaint as to certain of the respondents; and

The Commission, for reasons stated in its accompanying opinion, having concluded that said appeal should not be granted:

IT IS ORDERED that the respondents' appeal be, and the same hereby is, denied.

By the Commission,
ROBERT M. PARRISH,
Secretary

(Seal)

Issued: May 15, 1957.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners:

John W. Gwynne, *Chairman*
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

Docket No. 6555

In the Matter of Renaire Corporation (Pennsylvania), a corporation et al.

ON INTERLOCUTORY APPEAL FROM RULING OF HEARING EXAMINER

By the Commission:

An appeal has been filed from the hearing examiner's order of March 21, 1957, denying the respondents' motion to dismiss the complaint as to certain respondents.

The complaint under which this proceeding was instituted charged that the respondents were engaging in unfair and deceptive acts and practices in commerce in connection with the advertising, sale and distribution of freezers and frozen foods under a food purchase plan called the "Renaige Plan." Joined as parties respondent in the complaint were eleven corporations and also eight individuals whom [sic] the complaint alleged directed and controlled their corporate policies and served as their officers; and the complaint's additional allegations respecting each of the corporate respondents being a separate corporate entity and soliciting sales in separate trade areas, and being operated as a joint enterprise in such connection, have been admitted in the respondents' answer.

The motion to dismiss which was ruled on adversely by the hearing examiner was filed on behalf of nine of the eleven corporate respondents, and the grounds asserted were that they were not shown to be engaged in interstate commerce. Its denial by the hearing examiner was made without prejudice to renewal thereof at the time of closing of the case for the reception of evidence. In their appeal, the respondents state that immediate decision on jurisdictional questions is required to obviate prejudice to them in

defending against a proceeding which has been improperly instituted.

3.20 of the Commission's Rules of Practice provides that interlocutory appeals from rulings of hearing examiners will not be entertained unless showing is made that the ruling being appealed from involves substantial rights and will materially affect final decision, and that a determination of the correctness of such ruling before conclusion of the trial would better serve the interests of justice. The ruling of the hearing examiner does not restrict the appealing respondents in the presentation of their defense, and their rights, as well as those of other respondent co-members of the Renaire family of corporations, to have all questions of law and fact subsequently passed upon by the Commission are fully protected. The hearing examiner's order is not a decision on the merits or a final decision, and his ruling nowise affects any of the respondents' substantial rights. In order to justify an interlocutory appeal under the rule, a party ordinarily must demonstrate a likelihood of adverse effects from the challenged ruling more substantial than the inconvenience attending his presentation of a defense to the charges against him.

Having determined that the respondents' appeal does not come within the category of those to be granted under 3.20 of the Commission's Rules of Practice, our order accordingly provides for denial of the appeal.

May 15, 1957.

APPENDIX C

STATUTORY PROVISIONS INVOLVED

Section 5, Federal Trade Commission Act

(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers, and foreign air carriers subject to chapter 9 of Title 49, and persons, partnerships, or corporations subject to sections 181-203, 205-228 and 229 of Title 7, except as provided in section 227 of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect

and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for

review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however*, That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition to act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such tran-

script a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

(d) The jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(c) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the circuit court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the

Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

Statutory Provisions Involved

SECTION 10, ADMINISTRATIVE PROCEDURE ACT

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for

any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of section 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing

provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.